

FILED

MAR 31 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY L. SMALL,
Petitioner,

vs.

M.S. EVANS,
Respondent.

C 07-5133 MJJ (PR)

ORDER TO SHOW CAUSE

Petitioner, a California prisoner, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254. Petitioner has timely filed a second amended petition.

BACKGROUND

In 2002, petitioner was convicted of multiple offenses and sentence enhancements in Santa Clara County Superior Court. The California Court of Appeal affirmed the conviction and sentence, and the Supreme Court of California denied the petition for review.

DISCUSSION

A. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

1 B. Legal Claims

2 Petitioner makes the following claims: (1) the trial court violated petitioner's right to
 3 due process by finding sufficient evidence to require petitioner to stand trial on the charges;
 4 (2) there was insufficient evidence to support the conviction of Cal. Pen. Code §§ 261(a)(2),
 5 269, 288(c)(2); (3) there was insufficient evidence that petitioner violated Cal. Pen. Code §
 6 288a(c)(2); (4) the convictions on counts one and two violated petitioner's right to due
 7 process because of the trial court's failure to instruct the jury sua sponte on the meaning of
 8 the terms "force" or "forcible;" (5) the trial court's failure to sua sponte instruct the jury on
 9 the meaning of the word "force" under Cal. Pen. Code §§ 269(a)(1), 261(a)(2), and
 10 288a(c)(2) violated due process; (6) the trial court's failure to instruct the jury that it could
 11 only convict petitioner of the less serious of two offenses violated due process;¹ (7) petitioner
 12 received ineffective assistance of counsel because counsel failed to investigate or present
 13 evidence of an alibi defense; (8) counsel was ineffective in conducting the preliminary
 14 examination and appellate counsel was ineffective in failing to raise this issue on appeal; (9)
 15 counsel was ineffective in failing to notify petitioner of the charges and in failing to present a
 16 defense that the charges were not sufficiently specific. Liberally construed, these claims are
 17 cognizable.

18 **CONCLUSION**

19 For the foregoing reasons, the Court hereby orders:

20 1. The Clerk of the Court shall serve by certified mail a copy of this order, and the
 21 Second Amended Petition and all attachments thereto, upon respondent and respondent's
 22 attorney, the Attorney General for the State of California. The Clerk shall also serve a copy
 23 of this order on petitioner.

24 2. Respondent shall file with the Court and serve on petitioner, within 90 days of
 25 the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules
 26 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
 27

28 _____
¹This claim encompasses the sixth, seventh, eighth and ninth claims in the second amended petition, which all appear to overlap..

1 granted based on the cognizable claims described above. Respondent shall file with the
2 answer and serve on petitioner a copy of all portions of the state trial record that have been
3 transcribed previously and that are relevant to a determination of the issues presented by the
4 petition.

5 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
6 the Court and serving it on respondent within 30 days of his receipt of the answer.

7 3. Respondent may, within 90 days of the date this order is filed, file a motion to
8 dismiss on procedural grounds in lieu of an answer, as set forth in the Advisory Committee
9 Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a
10 motion, petitioner shall file with the Court and serve on respondent an opposition or
11 statement of non-opposition within 30 days of receipt of the motion, and respondent shall file
12 with the Court and serve on petitioner a reply within 15 days of receipt of any opposition.

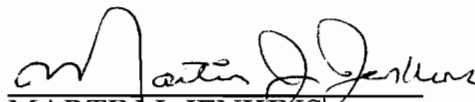
13 4. Petitioner is reminded that all communications with the Court must be served
14 on respondent by mailing a true copy of the document to respondent's counsel.

15 5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
16 Court and respondent informed of any change of address and must comply with the Court's
17 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
18 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

19 6. Upon a showing of good cause, requests for a reasonable extension of time will
20 be granted as long as they are filed on or before the deadline which they seek to extend.

21 IT IS SO ORDERED.

22 DATED: 3/21/2008

23 
24 MARTIN J. JENKINS
25 United States District Judge
26
27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOHNNY L. SMALL,
Plaintiff,

Case Number: CV07-05133 MJJ

CERTIFICATE OF SERVICE

v.


MS. EVANS et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 2, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Johnny L. Small J - 44318
P.O. Box. 1050
Soledad, CA 93960-1050

Dated: April 2, 2008


Richard W. Wieking, Clerk
By: Monica Tutson, Deputy Clerk